

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION**

UNITED STATES OF AMERICA,)	
)	
v.)	Criminal No. 3:03cr00013
)	
SHAWN ARNETTE BREEDEN)	
MICHAEL ANTHONY CARPENTER)	<u>MEMORANDUM OPINION</u>
and KEVIN THOMAS CASSELL,)		
Defendants)	

The government has charged Shawn Arnette Breeden, Michael Anthony Carpenter, and Kevin Thomas Cassell with capital murder and related offenses. The court originally scheduled the defendants' trial for July 14, 2003, but on the government's motion continued the trial pursuant to 18 U.S.C. § 3161 of the Speedy Trial Act to February 9, 2004. Before the continuance, defendants moved to bar the government from seeking the death penalty due to the government's failure to file a timely Notice of Intent to Seek the Death Penalty ("Death Notice") under 18 U.S.C. § 3593(a). Because this court continued the trial for reasons other than the government's failure to file the Death Notice, and because defendants received the Death Notice a reasonable time before the February 9, 2004, trial date, the court denies defendants' motion.

I.

On February 6, 2003, a federal grand jury returned a six count indictment charging Shawn Arnette Breeden, Michael Anthony Carpenter, Kevin Thomas Cassell, and Robbie Dionte Outterbridge with the murder of Kevin Lee Hester, among other acts. The indictment details the aggravating factors the government believes justify the death sentence. These charges could potentially

subject defendants to the death penalty. The court initially set trial for March 19, but continued it to July 14, 2003, on the motion of defendant Cassell.

On June 4, 2003, the defendants moved the court to bar the government from seeking the death penalty because the government failed to provide the defendants with Death Notices a reasonable time before the July 14, 2003, trial date. Breeden also indicated that he planned to plead guilty on July 14 if the death penalty was not a sentencing option.

On June 20, 2003, the government moved to continue the trial on various grounds including the following:

There are sixty-seven items of evidence that have been sent to the Commonwealth's forensic laboratory in Richmond, Virginia. These pieces of evidence are being analyzed in a number of ways for DNA, fingerprints, fibers, et cetera. Well over half of these items are still at the laboratory being analyzed. The reports from this evidence have yet to be completed; hence, they have not been reviewed by government or defense counsel. Obviously, the results of these analyses may be helpful to the government's case or they may be exculpatory for some or all of the defendants. In addition, a bullet taken from the victim's body has been submitted to the A.T.F. laboratory in Washington, D.C., to determine if the firearm that shot that bullet, which was lodged in the victim's head, has been used in any other crimes. This analysis is yet to be completed.

This court informed the parties that it would grant the government a short continuance because of the need to analyze the evidence. Out of caution, the court also told the parties to assume the case would be a death penalty case. The parties responded that they would not be prepared for a death penalty case until February, 2004. Accordingly, in a written order this court continued the trial under § 3161(h)(8)(A) of the Speedy Trial Act to February 9, 2004. On July 15, the government filed Death Notices with the court. The Death Notices stated that because of the heinous nature of the offenses and several aggravating factors, including other criminal conduct and the impact of the crime on the

victim and his family, the government would seek the death penalty against Breedon, Carpenter, and Cassell. The government decided not to seek the death penalty for Outterbridge.

II.

18 U.S.C. § 3593(a) requires that “if . . . the attorney for the government believes that the circumstances of the offense are such that a sentence of death is justified . . . the attorney shall, a reasonable time before the trial or before acceptance of the court of a plea of guilty, . . . serve on the defendant a notice” of the intent to seek the death penalty and the aggravating factors “justifying a sentence of death.” Breedon, Carpenter, and Cassell now claim that the government failed to serve them with the Death Notice required by 18 U.S.C. § 3593(a) a reasonable time before trial and that the court should bar the government from seeking the death penalty. The court concludes that because it properly continued the trial under the Speedy Trial Act for reasons unrelated to the government’s delay in filing the statutorily required Death Notices, it must gauge the timeliness of those notices in relation to the properly rescheduled trial date. So judged, the court finds that the government has served the notice “a reasonable time before the trial” and denies defendants’ motion.

A.

The first question the court must answer is which trial date to use when measuring the reasonableness of the timing of the notice: the previously scheduled July 14, 2003, trial date; the February 9, 2004, trial date, or some other date. The Fourth Circuit recently provided at least implicit guidance on this issue. In United States v. Ferebe, 332 F.3d 722 (2003), the Fourth Circuit stated that when a court encounters a challenge to the timing of a Death Notice, the court should consider “the

period of time remaining before trial, measured at the instant the Death Notice was filed and irrespective of the filing's effects . . . ” Id. at 737. This court reads the language “irrespective of the filing's effects” to mean that a court cannot continue a case for the purpose of allowing the government to file a timely Death Notice. Conversely, if the court properly continues a case under the Speedy Trial Act for reasons unrelated to the filing of the Death Notice, then the court should judge the timeliness of the Death Notice in relation to the properly rescheduled trial date.

Applying these principles to the present case, this court concludes that it should consider the February 9, 2004 trial date when assessing the reasonableness of the Death Notices because this court granted the continuance for reasons unrelated to the filing's effects. The court continued the case so that the forensics lab could fully analyze the evidence. Consequently, the court will consider the properly rescheduled trial date when assessing the timeliness of the Death Notices.¹

B.

Having decided that the February 9, 2004 trial date is the appropriate date to consider, the court now holds that the defendants received their Death Notices a reasonable time before trial. The

¹Although this court based the continuance from July 15, 2003 until February 9, 2004 upon the need to fully analyze the evidence, the court would likely have granted a shorter continuance based upon the need to analyze the evidence had it not been for the specter of the death penalty. Consequently, defendants might argue that although the court based the continuance on grounds unrelated to the government's filing of the Death Notice, the court should consider only the period of the continuance attributable to the evidence issue when assessing the timeliness of the Death Notice, and the court should disregard any portion of the continuance attributable to the parties' need to prepare for a death penalty case since this period of time is not “irrespective of the filing's effects.” This court believes that position wholly unworkable, essentially requiring judges to assign two trial dates—one if the death penalty is possible and another if it is not. More fundamentally, it creates unnecessary tension between the Speedy Trial Act and 18 USC § 3593(a).

Fourth Circuit recently confronted a challenge to the timing of a Death Notice. In Ferebe the Court of Appeals reasoned that § 3593(a) creates a prophylactic right and that its “indisputable purpose is to ensure that the accused will not be required to stand trial for his life without having received adequate notice before that trial that he is to stand trial for capital offense . . .” Ferebe 332 F.3d at 727.

Because the statute created a prophylactic right, a court should not consider prejudice when determining the reasonableness of the Death Notice, because to do so would “confuse the question of harmlessness with the question of violation.” Id. at 736. Consequently, Ferebe held that a court must conduct a “pre-trial, objective reasonableness” inquiry when confronted with an alleged violation of § 3593(a). Id. at 737. In order to judge the reasonableness of the notice, a court should consider “(1) the nature of the charges presented in the indictment; (2) the nature of the aggravating factors provided in the Death Notice; (3) the period of time remaining before trial, measured at the instant the Death Notice was filed and irrespective of the filing’s effects; and, in addition, (4) the status of the discovery in the proceedings.” Id. A careful weighing of these factors compels this court to conclude that the government filed the Death Notice a reasonable time before trial.

First, the nature of the charges against defendants weighs in favor of finding the notices reasonable. The legal and factual issues alleged do not appear so complex or atypical such that five months would be an unreasonably short period of time to prepare a defense. See United States v. Hatten, 2003 WL 21946458 (S.D.W. Va. 2003) (considering typicality of offense when assessing reasonableness of § 3593(a)). Consequently, the nature of the charges against the defendants does not indicate that the notices were unreasonable.

Second, the nature of the aggravating factors does not weigh in favor of holding the timeliness

of the notices unreasonable. Once again, the statutory and non-statutory aggravating factors are typical, and nothing remotely suggest that the defendants cannot adequately prepare.

The third factor is the period of time remaining before trial, measured at the instant the government filed the Death Notice and irrespective of the filing's effects. From July 15, 2003, (the day the government filed the Death Notice) to February 9, 2004, is a period of six months and twenty-five days. Although at least one court has held that one month is an unreasonable time (see Hatten, 2003 WL at 4-5), no court has suggested that a period of nearly seven months is unreasonable. This court holds that measured even from today's date, defendants have adequate time to prepare to meet the charges and the aggravating factors the government seeks to prove.

The final factor, the status of discovery proceedings, also indicates the government filed the Death Notices a reasonable time before trial. Although the forensics lab has not yet fully analyzed several vital pieces of evidence (thus requiring the continuance to February), there is a adequate time before trial for the lab to fully analyze the evidence and make it available to both parties. Therefore, the status of discovery supports finding the timing of the notice reasonable.

III.

For the reasons stated above, court denies the defendants' motion to bar the government from seeking the death penalty.

ENTER: This August 26, 2003.

CHIEF UNITED STATES DISTRICT JUDGE

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MICHAEL ANTHONY CARPENTER)	<u>ORDER</u>
and KEVIN THOMAS CASSELL,)		
Defendants)	

It is **ORDERED** and **ADJUDGED** that the motions of defendants Shawn Arnette Breedon, Michael Anthony Carpenter, and Kevin Thomas Cassell to bar the government from seeking the death penalty are **DENIED**.

ENTER: This August 26, 2003.

CHIEF UNITED STATES DISTRICT JUDGE

